86-1944

No. 86-

Supreme Court, U.S.
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IN THE

Supreme Court of the United States

OCTOBER TERM, 1986

SOUNG O. KWOUN, *et al.*,

Petitioners,

vs.

SOUTHEAST MISSOURI PROFESSIONAL STANDARDS REVIEW ORGANIZATION, *et al.*,

Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

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QUESTIONS PRESENTED

1. Are private physicians and other employees of a Medicare peer review organization operating under contract with the United States Department of Health and Human Services entitled to absolute immunity from claims of race discrimination and other constitutional violations as well as from common-law tort claims even though Congress, by statute, has extended only qualified immunity?

2. Are non-attorney federal officials entitled to absolute immunity from the constitutional tort and race discrimination claims of a physician excluded from Medicare reimbursement, where the exclusion is by a non-judicial administrative decision made without a hearing and in the absence of minimal due process?

3. Are Medicare peer reviewers and

federal Medicare administrators entitled to absolute immunity on policy grounds arising from the importance of the Medicare peer review scheme, without regard to the countervailing importance of eradicating racial discrimination?

Parties in the Court Below

1. The petitioners, Soung O. Kwoun, Henrickson Clinic, Inc., Henrickson Clinic Pharmacy, Inc., and Henrickson Clinic Laboratory, Inc., were plaintiffs below.

2. The following are respondents here and were defendants below: Southeast Missouri Professional Standards Review Organization; Missouri Statewide Professional Standards Review Council; Robert M. Kepner; Raymond A. Ritter; Sue Legaspi; James Armantrout; Larry Baker; William V. Booth; Jean A. Chapman; V. D. Delles; R. F. Dettmer; Gordon Eller; Jose H. Gonzales; T. O. Honaas; Robert C. Hoye; W. W. Hutton; Christopher Jung; G. H. Ladyman; John K. Legan; Gene H. Leroux; R. E. Marts; A. G. Miranda; Jesse Page; Pin Pu; Vinai Raksakulthai; Ben Till; A. T. Tuma; Austin Tinsley; Joseph Blanton; D. E. Edwards; Terry Guiley; Tom

Henderson; Berry B. White; Randall Huss; George McAnelly; Robert Robbins; Eugene Ruff; C. F. Sparger; Michael K. Blank; James Conant; A. N. Sandler; Allen Spitler; Kirby Turner; E. K. Buford; David Clark; Fuad H. Kandalaft; Earl Kennedy; Martha Reed; Clifford Talbert; Charles P. McGinty; W. E. Hendrickson; Robert E. Bregant; Katherine Rosenfeld; Frank Kram; Don Nicholson; Ralph A. Howard.

3. No review is sought here as to the following defendants in the courts below: General American Life Insurance Company; Tom Zorumski; Clifford A. Kinnunen; W. F. Montgomery; and Gary Clark.

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SOUNG O. KWOUN, et al.,

Petitioners,

vs.

SOUTHEAST MISSOURI PROFESSIONAL STANDARDS REVIEW ORGANIZATION, et al.,

Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

The petitioner, Soung O. Kwoun,[1] respectfully prays that a writ of certiorari issue to review the judgment and opinion of the United States Court of Appeals for the Eighth Circuit entered in this proceeding on February 4, 1987.

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[1]Dr. Kwuon and the professional corporations through which he practices are plaintiffs-petitioners.

CITATIONS TO OPINIONS BELOW

The opinion of the court of appeals is reported at 811 F.2d 401 (8th Cir. 1987) and is set out in the separate Appendix to this petition at pp. 1a-55a. The orders of the court of appeals affirming the district court and denying rehearing are set out in the Appendix at pp. 145a- 148a. The opinions of the district court are reported at 622 F. Supp. 520 (E.D. Mo. 1985) and 632 F. Supp. 1091 (E.D. Mo. 1986) and are set out in the Appendix at pp. 76a-123a and 124a-139a, respectively. The decision of the district court denying plaintiffs' motion to alter or amend the judgment is unreported and is set out in the Appendix at pp. 140a-143a. An earlier decision of the district court in a related case, entitled Kwoun v. Schweiker, is reported at 528 F. Supp. 1004 (E.D. Mo. 1981) and is set out in the Appendix at pp. 56a-

75a.

JURISDICTION

The judgment of the court of appeals affirming the district court's dismissal of the case in its orders of March 27, 1986, and June 3, 1986, was entered on February 4, 1987. (A. 145a-146a) The court of appeals entered an order denying a timely petition for rehearing en banc, or, in the alternative, for rehearing by the panel, on March 9, 1987, and this petition for certiorari is filed within 90 days of that date. (A. 147a-148a.) The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

CONSTITUTIONAL PROVISION, STATUTES, AND REGULATIONS INVOLVED

This case involves a constitutional claim of denial of due process under the Fifth Amendment, and claims of racial discrimination and conspiracy under 42 U.S.C. § 1981 and § 1985(3), which are set out in relevant part in the Appendix

at pp.156a-157a.

Other statutes involved are the Medicare Peer Review Act, as amended, 42 U.S.C. § 1320c et seq., including: 42 U.S.C. § 1320c-16(b)(1977), now 42 U.S.C. § 1320c-6(1982), § 1320c-5, § 1320c-8, and § 1320c-9 which are set forth, in relevant part, in the Appendix at pp. 149a-156a.

Regulations involved are 42 C.F.R. §§ 474.3, 474.4, 474.7, 474.8, and 474.10, along with the PSRO Program Manual, all of which are set forth in relevant part in the Appendix at pp. 158a-167a.

STATEMENT OF THE CASE

The petitioner, Soung O. Kwoun, M.D., is a surgeon who was excluded from eligibility for Medicare reimbursement for services rendered to his patients by a ten year sanction decision of the Health Care Financing Administration

(H.C.F.A.) of the Department of Health and Human Services (HHS), in 1980.

The H.C.F.A. was acting on a recommendation based upon alleged quality of care issues issued by the Southeast Missouri Professional Standards Review Organization (the SEMO PSRO) which had been forwarded to the H.C.F.A. by the Missouri Statewide Professional Standards Review Council (the Statewide Council). The SEMO PSRO and the Statewide Council are non-volunteer peer review organizations operating under contract with HHS, pursuant to 42 U.S.C. § 1320c, et seq., which are incorporated as non-profit corporations under Missouri law, and which pay their participants in accordance with the directives of HHS.

Pursuant to statute and the implementing regulations, the sanction decision against Dr. Kwuon was imposed and a notice of his exclusion from

eligibility for Medicare reimbursement for quality of care reasons was published in newspapers in the area in which he practiced prior to a hearing.[2] He was required to take an administrative appeal in order to obtain a hearing before an adjudicative officer.

Dr. Kwoun appealed the sanction decision under 42 U.S.C. § 1320c-8(b). In 1983, after a hearing on the record before a federal Administrative Law Judge, Dr. Kwoun was restored to eligibility for Medicare reimbursement.[3]

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[2]42 U.S.C. § 1320c-9(b)(2); 42 C.F.R. § 474.10(e).

[3]As a result of information provided by the HCFA to the Missouri State Board of Registration For The Healing Arts and the Missouri Department of Social Services which administers state Medicaid payments, Dr. Kwoun was also threatened with exclusion from eligibility for Medicaid payments and with revocation of his medical license. Dr. Kwoun was cleared of the charges brought by the Board of Healing Arts on May 18, 1984, and of the charges made by the Department of Social Services in the attempt to

The Administrative Law Judge, in a lengthy opinion,[4] reversed the sanction decision of the HCFA and held that the HCFA had failed to establish any violation of any obligation or any professional neglect under the Medicare Act by Dr. Kwoun. (Court of Appeals Appendix, hereinafter "C.A. App.," 519.)

The ALJ found that the SEMO PSRO, the Statewide Council, and the HCFA had excluded Dr. Kwoun from eligibility without ever having developed Professional Standards of Health Care as required by 42 U.S.C. § 1320c-5(a) against which to compare Dr. Kwoun (C.A. App. 516-17, 520). The ALJ further found that the SEMO PSRO and the HCFA had

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exclude him from Medicaid payments on November 7, 1983, after two separate hearings before the Missouri Administrative Hearing Commission.

[4]The opinion is 183 pages, excluding exhibits, and was based on more than 2,100 pages of transcript.

totally failed to comply with the notice and opportunity to respond provisions of 42 C.F.R. Part 474, and that ". . . by reason of the Health Care Financing Administration's failure from the onset of the prosecution of this case to rectify the procedural errors of the SEMO PSRO by stating clearly the factual and legal issues, the respondent did not receive substantive due process in accordance with the Social Security Act and Regulations and the policy of the Department of Health and Human Services." (C.A. App. 506) The ALJ found that the medical records upon which the HCFA based its sanction decision had been rearranged, the sanction report had been tailored, and that at least one document purportedly found in a patient file had been contrived. (C.A. App. 528)

In strong language, the ALJ called the HCFA's pursuit of sanctions against

Dr. Kwoun "despicable" and conduct not worthy of professional people, and stated that there may have been some motive other than a concern over the quality of Dr. Kwoun's care of patients behind the sanction decision. (C. A. App. 513, 509) Indeed, at a non-due process administrative review before an HCFA official, one of Dr. Kwoun's witnesses testified under oath that he had heard a member of the SEMO PSRO publicly state that they wanted to get rid of "those damn Koreans" and that they just about "had Dr. Kwoun where they wanted him," and that then they were going to start on another Korean doctor in the area. (C.A. App. 305.) Although the original investigation was of the entire hospital at which Dr. Kwuon practiced, Dr. Kwuon was the only physician against whom sanctions were sought.

After the sanction decision was

reversed,[5] Dr. Kwoun brought suit against four employees of HCFA, in their individual capacities, fifty-one physicians and staff persons who were members and employees of the SEMO PSRO and of the Statewide Council, the SEMO PSRO and the Statewide Council themselves, and certain other defendants who are not respondents here.[6] The suit alleged claims of discrimination on account of race (Korean) in violation of 42 U.S.C. § 1981 and 42 U.S.C. § 1985(3), due process violations under the Fifth

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[5]A prior injunction action, brought by Dr. Kwoun, Kwoun v. Schweiker, 528 F. Supp. 1004 (E.D. Mo. 1981), was dismissed without prejudice by the U.S. District Court, Eastern District of Missouri, for failure to exhaust administrative remedies, and was not appealed. A. 56a-75a.

[6]Petitioners do not seek review of the district court's dismissal of the General Life Insurance Company or of the court of appeals' decision with regard to the state employee defendants, Montgomery and Clark.

Amendment, and state law claims of malicious prosecution and intentional infliction of severe emotional distress, and other claims not relevant here. The jurisdiction of the district court was invoked under 28 U.S.C. § 1331 and § 1343, and pendent jurisdiction. Damage allegations were based upon loss of income, damage to Dr. Kwoun's practice and reputation, and emotional distress.

In an order dated September 19, 1985, the district court denied the federal defendants' motion to dismiss on grounds of absolute immunity under Butz v. Economou, 438 U.S. 478 (1978) and official immunity under Barr v. Matteo, 360 U.S. 564 (1959). The federal defendants took an immediate appeal.[7]

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[7]Plaintiffs argued in the court of appeals that the denial of the federal defendants' motion to dismiss on grounds of official immunity under Barr was not an immediately appealable order under Mitchell v. Forsyth, 472 U.S. ___, 86 L.Ed.2d 411 (1985) and Nixon v.

The SEMO PSRO defendants' motions based on official immunity under Bushman v. Seiler, 755 F.2d 653 (8th Cir. 1985) and on other grounds were denied by the district court. A. 76a-123a.

However, on March 27, 1986, the district court sua sponte entered an order dismissing the entire case on the grounds that the peer review defendants were entitled to what was later described as "qualified immunity,"[8] a claim they had never raised. In so ruling, the court stated that it would "correct"

Fitzgerald, 457 U.S. 731 (1982). Although the court of appeals addressed the question of official immunity under Barr before it reached the question of absolute immunity under Butz, the court did not address the procedural and jurisdictional question of appealability anywhere in its opinion.

[8]In its March 27 order the district court did not describe the immunity it was granting as qualified, but discussed it in terms appropriate to a grant of absolute immunity. It was only in its later June 3 order that the district court used the term "qualified immunity."

Congress' failure to grant Medicare peer reviewers immunity. A. 124a-139a. In an order dated June 3, 1986, the district court held that its dismissal extended to all defendants, and that it intended to overrule its September 19, 1985 order with respect to the federal defendants.[9] A. 140a-143a. Dr. Kwoun appealed from the latter two orders of the district court to the Court of Appeals for the Eighth Circuit. The three appeals were consolidated for argument and decision.

The court of appeals held that all of the sixty-some defendants in the case,

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[9]The question of the procedural unfairness of a sua sponte dismissal of the case on grounds barring later litigation on the merits was presented to the court of appeals but was not addressed by that court even though the Eighth Circuit has consistently held that sua sponte grants of summary judgment are improper and require reversal. Williams v. City of St. Louis, 783 F.2d 114, 116 (8th Cir. 1986), Denton v. Mr. Swiss of Missouri, 564 F.2d 236, 242 (8th Cir. 1977), Twin City Federal Savings & Loan Association v. Transamerica Ins. Co., 491 F.2d 1122 (8th Cir. 1974).

including the peer review physicians, were entitled to absolute immunity under Butz v. Economou, 438 U.S. 478 (1978), and to the immunity of federal officials from common-law tort claims under Barr v. Matteo, 360 U.S. 564 (1959). Therefore, Dr. Kwuon's claims of racial discrimination and denial of due process must be dismissed in their entirety. At oral argument before the appeals court, government counsel had expressed the opinion that the peer review organizations could claim qualified but not absolute immunity. Since it held that all defendants were entitled to absolute immunity, the court of appeals did not reach the issue of the correctness of the district court's dismissal purportedly based on qualified immunity.

Judge Heaney, in a dissenting opinion, objected to the court of appeals

ordering the case dismissed. Instead, he urged, the court should have remanded for a determination by the district court of the functions performed by the federal defendants, as this Court did in Butz. He further urged that the peer review defendants were not entitled to absolute immunity in light of the clear language of 42 U.S.C. § 1320c-16 (1977), which expressly provides such persons with only good faith immunity. A. 43a-55a.

A petition for rehearing or for rehearing en banc was denied, thus occasioning this petition for a writ of certiorari.

REASONS FOR GRANTING THE WRIT

I. THIS CASE PRESENTS QUESTIONS OF NATIONAL IMPORTANCE THAT SHOULD BE RESOLVED BY THIS COURT

The present case raises significant questions concerning the scope of immunity to which state and federal officials responsible for carrying out portions of the Medicare program are entitled. At issue is not only the immunity doctrine as developed by decisions of this Court but also the intent of Congress when it enacted an immunity provision as part of the Medicare Act.

The Medicare program is nationwide in scope and is one of the primary means of providing low cost medical care to the poor and elderly.[10] Its administration depends to a significant degree on the

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[10] K. Davis, "Adequate Health Care and an Aging Society: Are they Morally Compatible?" Winter Daedalus, 227, 229-230 (1986).

states and on private physicians, both as providers of care and as regulators. For the minority poor, often the only source of medical care is minority physicians who are willing to establish practices in their communities.[11] Racial discrimination in the administration of the program can have a devastating effect, therefore, not only on the rights of minority physicians who are excluded as a result of prejudice but also on those persons for whose ultimate benefit the Medicare program is intended.

Physicians excluded from Medicare payments because of their race or ancestry not only suffer the immediate consequence of suspension from eligibility for reimbursement but suffer

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[11]S. Keith, R. Bell, A. Swanson, A. Williams, "Effects of Affirmative Action in Medical Schools: A Study of the Class of 1975." Vol. 313, No. 24, The New England Journal of Medicine 1519, 1524 (1985).

serious damage to their reputations and practices that restoration to eligibility is inadequate to correct. The only effective remedy for, and deterrent to, racial discrimination in this situation is the availability of damages against those who violate the civil and constitutional rights of physicians.

The importance of the issues presented here are not confined to the operation of the Medicare program. In recent years there have been dozens of reported decisions by both the federal appellate and district courts that have grappled with the issue of when and to what degree particular officials should be granted immunity from actions for damages. The results have been divergent, with courts granting absolute immunity to some officials,[12] and

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[12] E.g., Johnson v. Rhode Island Parole Bd. Members, 815 F.2d 5 (1st Cir. 1987); Sellars v. Procunier, 641 F.2d

qualified immunity to others.[13]

1295 (9th Cir. 1981) (parole board members); Tripati v. U.S.I.N.S., 784 F.2d 345 (10th Cir. 1986) (federal probation officer); Harper v. Jeffries, 808 F.2d 281 (3rd Cir. 1986) (parole board hearing officer absolutely immune; probation officer only entitled to qualified immunity); Clulow v. State of Oklahoma, 700 F.2d 1291 (10th Cir. 1983) and Simons v. Bellinger, 643 F.2d 774 (D.C. Cir. 1980) (attorney disciplinary committees); Austin Municipal Securities Inc. v. Nat'l Ass'n of Securities Dealers, Inc., 757 F.2d 676 (5th Cir. 1985) (securities dealers' association).

[13] E.g., LeClair v. Saunders, 627 F.2d 606 (1980) (dairy farm inspector); England v. Rockefeller, 739 F.2d 140 (4th Cir. 1984) (governor not entitled to absolute legislative immunity); McSurley v. McClellan, 753 F.2d 88 (D.C. Cir. 1985) (congressional staff member); Freeman v. Blair, 793 F.2d 166 (8th Cir. 1986) (department of health inspectors); Bothke v. Fluor Engineers & Constructors, Inc., 713 F.2d 1405 (9th Cir. 1983), vacated on another ground, 468 U.S. 1201 (1984), order on remand, 739 F.2d 484 (9th Cir. 1984) (IRS official entitled only to qualified immunity); accord, Cameron v. IRS, 773 F.2d 126 (7th Cir. 1985); Tripati v. U.S.I.N.S., supra (immigration official entitled only to qualified immunity); Weiss v. Lehman, 642 F.2d 265 (9th Cir. 1981), vacated on other grounds, 454 U.S. 807 (1981) (Forest Service employee); Windsor v. The Tennessean, 719 F.2d 155, reh. denied, 726 F.2d 277 (6th Cir. 1983) (U.S. Attorney acting as employer only entitled

The decisions conflict both in terms of the results and the standards used. In the present case the court below decided as a matter of policy that certain types of officials should have absolute immunity without requiring a particularized showing of the functions performed by the officials. Other courts have followed the admonition of this Court in Nixon v. Fitzgerald, 457 U.S. 731 (1982) and have required a rigorous showing of need and function before extending absolute immunity.[14]

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to qualified immunity); Kompare v. Stein, 801 F.2d 883 (7th Cir. 1986) (medical examiner).

[14]See, e.g., Gray v. Bell, 712 F.2d 490 (D.C. Cir. 1983); Sellars v. Procunier, 641 F.2d 1295 (9th Cir. 1981), followed, Johnson v. Rhode Island Parole Bd. Members, 815 F.2d 5 (1st Cir. 1987). Bothke v. Fluor Engineers & Constructors, Inc., supra (under functional analysis, IRS official had only qualified immunity); Tripati v. U.S.I.N.S., supra (immigration official who reported alien to INS had qualified immunity, probation officers who prepared reports had absolute immunity); Harper v. Jeffries,

Petitioners urge that this case provides the opportunity for the Court to resolve a number of issues that have divided the lower courts and to provide guidance that will permit them to decide in particularized cases the degree of immunity to which an official should be entitled.

II. THE DECISION BELOW CONFLICTS WITH PRIOR DECISIONS OF THIS COURT AND WITH DECISIONS OF OTHER CIRCUITS REGARDING THE CIRCUMSTANCES UNDER WHICH ABSOLUTE IMMUNITY IS APPROPRIATE.

A. The Decision Below Conflicts With Decisions of This Court

The court below has misconstrued the scope of absolute immunity delineated in this Court's decisions in Imbler v. Pachtman, 424 U.S. 409 (1976), and Butz

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supra (parole board member has absolute immunity, probation officer only qualified immunity). See also McKinney v. Whitfield, 736 F.2d 766 (D.C. Cir. 1984) (functional analysis used to deny immunity to common-law torts to federal official acting outside the scope of authority). Contra Dretar v. Smith, 752 F.2d 1015 (5th Cir. 1985).

v. Economou, and has granted absolute immunity based upon points expressly left undecided by prior decisions of this Court.

The decision of the court of appeals takes the doctrine of prosecutorial and judicial immunity laid out in Imbler and extended in Butz, and expands it beyond all recognition, in holding that all of the participants in Medicare peer review, whatever their role, are entitled to the absolute immunity of prosecuting attorneys. The result is to completely bar a physician who claims that his wrongful exclusion from Medicare reimbursement was motivated by racial considerations from recovering for any part of his loss under common law, statutory, or constitutional theories.

In Imbler, this Court expressly left undecided the question whether a prosecutor performing investigative or

administrative tasks would be entitled to absolute immunity. In Butz, the Court held that federal hearing examiners or administrative law judges, agency attorneys arranging for the presentation of evidence on the record, and agency officials responsible for initiating or continuing a proceeding subject to agency adjudication were entitled to absolute immunity because their roles were analogous to those of judges and prosecuting attorneys. On the other hand, officials not performing such functions would be entitled to only qualified immunity, and that the actual functions performed would be determined by the district court on remand.[15]

The Court has denied absolute immunity to the Attorney General of the

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[15] On remand, Economou v. Butz, 466 F. Supp. 1351 (S.D.N.Y. 1979), the district court held that two of the defendants in Butz were not entitled to absolute immunity.

United States, Mitchell v. Forsyth, 472 U.S. ____, 86 L.Ed.2d 411 (1985), where the claim to absolute immunity was asserted based upon policy considerations. The Court has also indicated that the "public policy" to be considered in connection with claims for absolute immunity has to do with "the 'inherent' or 'structural' assumptions of our scheme of government," Nixon v. Fitzgerald, 457 U.S. 731, 748 n. 26 (1982), rather than with policy considerations per se.

In Cleavinger v. Saxner, 474 U.S. ___, 88 L.Ed.2d 507 (1985), this Court declined to grant members of a federal prison discipline committee absolute immunity, holding that the discipline committee's function was not a classic adjudicatory one. An important factor in the decision was the unavailability in the proceedings at issue of the

procedural safeguards present in Butz under the Administrative Procedure Act. 88 L.Ed.2d at 517.

In the present case, both the district court and the court of appeals determined that the peer review physicians and federal officials were entitled to immunity because of the importance of Medicare peer review to the Medicare system. The district court stated, "Immunity has consistently been provided for groups and individuals who by legal mandate, are charged with undertaking unpopular tasks," (A. 134a) relying on Malley v. Briggs, 475 U.S. ___, 89 L.Ed.2d 271 (1986).[16] The

[16]The district court, by relying on Malley, supra, apparently intended to grant the peer review defendants qualified immunity and to dismiss on that basis, although it did not so state. The court did not, in its March 27, 1986 order, apply the analysis set forth in Harlow v. Fitzgerald, 457 U.S. 800 (1982) or in Mitchell v. Forsyth, 472 U.S. __, 86 L.Ed.2d 411 (1985) to determine whether the defendants were alleged to

district court further stated that although Congress had "determined that comprehensive review of government funded health care is in the public interest," Congress had "not specifically provided immunity to encourage PSROs to vigorously pursue their appointed task," and "[t]he Court will correct Congress' oversight with its ruling today." (A. 138a-139a.)

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have violated rights which were clearly established at the time of the alleged conduct. However, in the district court's earlier order of September 19, 1985, the court had held that Dr. Kwoun's claim of entitlement to Medicare reimbursement, provided he complied with the conditions and requirements of the Medicare statutes, was within the type of property interests recognized in Board of Regents v. Roth, 408 U.S. 564, 577 (1972), that his claim of damage to his practice was recognized in Schware v. Board of Bar Examiners, 353 U.S. 232, 238 (1957), and that other claimed deprivations had been recognized by the Eighth Circuit in Bishop v. Tice, 622 F.2d 349, 357 (8th Cir. 1980). Other courts have held that physicians have liberty and property interests in connection with Medicare reimbursement. Patchogue Nursing Center v. Bowen, 797 F.2d 1137 (2nd Cir. 1986); Case v. Weinberger, 523 F.2d 602 (2nd Cir. 1975).

The court of appeals granted absolute immunity to the peer review defendants, analogizing Medicare peer review to attorney disciplinary committees[17] and to the disciplinary committee of a securities dealers' association,[18] to which other circuits have granted absolute immunity. The court stated, "we are convinced that absolute immunity is 'essential for the conduct of the public business,' Butz, 438 U.S. at 507, . . . in this critical health care area." A. 362.

In affording the federal defendants absolute immunity, the court of appeals held that the federal officials' actions were at all relevant times prosecutorial

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[17] citing Clulow v. State of Oklahoma, 700 F.2d 1291, 1298 (10th Cir. 1983) and Simons v. Bellinger, 643 F.2d 774, 782 (D.C. Cir. 1980).

[18] citing Austin Municipal Securities, Inc. v. National Association of Securities Dealers, Inc., 757 F.2d 676, 689 (5th Cir. 1985).

in nature. A. 21a. The court ignored the differences between the statutory scheme at issue in Butz under the Commodities Exchange Act and the Administrative Procedure Act, and in Austin, under the Securities and Exchange Act, where the initial action taken by the agency is a formal charge that is followed immediately by a judicial-type hearing on the record at which a charged party has the right to counsel and cross-examination, and the proceedings under the peer review statute here. The sanctioned provider is excluded from reimbursement by an administrative decision and a publication of the Medicare denial in a local newspaper long prior to any opportunity for an adjudicatory hearing. 42 U.S.C. § 1320c-9(b)(2), 42 C.F.R. § 474.10(e).

The court of appeals' logic would grant absolute immunity to any official,

regardless of his or her actual functions, if the action taken is eventually reviewed or subject to an adjudicatory hearing. Such a result is wholly at odds with the fundamental proposition that absolute immunity is the exception rather than the rule and is to be granted only to a narrow class of officials whose duties and functions particularly require immunization from the threat of suit. Harlow v. Fitzgerald, 457 U.S. 800, 807 (1982); Butz v. Economou, 438 U. S. at 506.

In sum, this case provides the Court the opportunity to resolve, for the guidance of the lower courts, two issues left undecided by Imbler and Butz: (1) what is the scope of the administrative and investigatory exception to absolute prosecutorial immunity; and (2) what are the limits of the policy considerations for granting absolute immunity that were

discussed in Butz? The issues in this case are presented in a context in which Congress has expressly provided that only limited immunity, of a hybrid variety, would be available to peer review participants. 42 U.S.C. § 1320c-16 (1977).[19] Although the case does not present the issue of a Congressional attempt to abrogate an already established application of immunity,[20] it does present issues concerning the limits of Imbler and Butz in the context of an explicit Congressional determination that public policy does not require absolute immunity.[21]

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[19]The present statutory section is 42 U.S.C. § 1320c-6(1982).

[20]See Nixon v. Fitzgerald, 456 U.S. at 748, n. 27.

[21]The legislative history of the Senate Committee on peer review appears at S. Rep. No. 1230, 92nd Cong. 2d Sess. 256-58 (1972) and with regard to PSRO liability states:

> The amendment provides

B. The Decision Below Conflicts With Decisions Of Other Circuits.

As can be seen from the text and cases cited above at nn. 12-14, other circuits have begun with the proposition that absolute immunity is the exception, not the norm. E.g., Windsor v. The Tennessean, 719 F.2d 155, 163-4 (6th Cir. 1983); Cameron v. I.R.S., 773 F.2d 126, 128 (7th Cir. 1985); Bothke v. Fluor Engineers and Constructors, Inc., 713 F.2d 1405 (9th Cir. 1983). Thus, other courts of appeals have engaged in a particularized analysis of the functions

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> protection from civil liability for those engaged in required review activities, or who provide information to PSROs in good faith, for actions taken in the proper performance of these duties. Activities taken with malice toward a practitioner or institution, or group of practitioners would not be considered action taken in the proper performance of these duties.

S. Rep., supra, at 266-67.

of each of the officials involved to determine whether absolute or qualified immunity was appropriate. See, e.g., Tripati v. U.S.I.N.S., 784 F.2d 345 (10th Cir. 1986); Harper v. Jeffries, 808 F.2d 281 (3rd Cir. 1986).

The court below, on the other hand, extended absolute immunity to every level and type of official involved in the peer review process because of policy considerations it derived from an overview of the statutory scheme involved. The absence of any functional analysis places the decision in square conflict with at least five other circuits.

III. THE DECISION BELOW CONFLICTS WITH THE DECISIONS OF OTHER CIRCUITS AS TO WHETHER PHYSICIANS ENGAGED IN MEDICARE PEER REVIEW ARE FEDERAL OFFICIALS AND WITH STATE COURTS AS TO THE SCOPE OF THEIR IMMUNITY FROM SUIT.

The court of appeals held that Medicare peer reviewers are federal

officials, ignoring both the clear Congressional intent that Medicare peer review be placed in the private sector,[22]

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[22]The legislative history of the Professional Standards Review statute is set forth in detail in Public Citizen Health Research Group v. Department of Health, Education, and Welfare, 668 F.2d 537, 542-43 (D.C. Cir. 1981). From its review of the legislative history the court concluded:

> We begin with the Report of the Senate Committee on Finance on the Social Security Amendments of 1972, S. Rep. No. 92-1230, 92d Cong., 2d Sess. (1972). It was the 1972 amendments which authorized the establishment of PSROs. Reading the Report, we are struck by the strong and recurrent theme, that the review process must be conducted by practicing physicians, not by the government or government employees. This theme is sounded over and over in the report.
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> * * * *
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> We think these expressions demonstrate the fixed purpose of Congress that PSROs should be independent medical organizations operated by practicing physicians in the private sector, and not government agencies run by government employees. Government, said the committee, should not undertake to review the appropriateness and quality of

and the decisions of other circuits that are to the contrary. Public Citizen Health Research Group v. Department of Health, Education, and Welfare, 668 F.2d 537, 544 (D.C. Cir. 1981); U.S. v. University Hospital, 729 F.2d 144 (2nd Cir. 1984).

The court of appeals determined that the peer review defendants were federal officials in order to reach the further holding that they were therefore entitled

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medical services. A holding that the Foundation, an organization of private physicians, constitutes a government agency would be inconsistent with the congressional purpose.

See also Association of American Physicians and Surgeons v. Weinberger, 395 F. Supp. 125, 140 (N.D. Ill. 1975), affirmed without opinion, 423 U.S. 975 (1975).

HHS, in the PSRO Program Manual, states: "The Department of Health, Education, and Welfare recognizes that PSROs operate as independent, private, nonprofit corporations." P.S.R.O. Program Manual, Chapter XXIV, p. 1, June 20, 1978. See Appendix at 167a.

to official immunity from common law tort claims under Barr v. Matteo, 360 U.S. 564 (1959).[23] As the dissent below points out, however, (A. 51a-53a), a number of state courts have held that medical peer review committees, their members, and witnesses before them have only qualified immunity.[24]

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[23]The court of appeals considered the issue of official immunity from common law tort claims under Barr as to each group of defendants prior to considering the defendants' claims to absolute immunity under Butz v. Economou, thereby revealing considerable analytical confusion about the application of these immunity defenses; absolute immunity based upon prosecutorial or judicial functions would subsume the official immunity established in Barr.

[24]See, e.g., Franco v. District Court of Denver, 641 P.2d 922, 925 (Colo. 1982); (citing, Note, The Legal Liability of Medical Peer Review Participants For Revocation of Hospital Staff Privileges, 28 Drake L. Rev. 692 (1978-79); Note, Medical Peer Review Protection In the Health Care Industry, 52 Temple L.Q. 552 (1979)). Hayden v. Foryt, 407 So.2d 535, 536 (Miss. 1982), (granting review committee and witnesses before committee qualified immunity); Buckner v. Lower Florida Keys Hosp. Dist., 403 So.2d 1025, 1028 (Fla. App. 1981) (granting hospital

The other circuits that have held that PSROs were not federal entities have thereby reached findings that they were not liable under the Freedom of Information Act. Public Citizen Health Research Group v. Department of Health, Education, and Welfare, supra; U.S. v. University Hospital. On the other hand, the Fifth Circuit in Smith v. North Louisiana Medical Review Association, 735

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staff and disciplinary body and its agents qualified immunity); Hackenthal v. Weissbein, 592 P.2d 1175, 154 Cal. Rptr. 423, 426-27, 24 C.3d 55 (1979) (granting qualified immunity to witnesses at hearing of peer review committee of nonpublic institution); Matviuw v. Johnson, 26 Ill. Dec. 794, 388 N.E.2d 795, 799, 70 Ill. App. 3d 481 1979) (granting witnesses at hearing of peer review committee qualified immunity), aff'd, 67 Ill. Dec. 370, 444 N.E.2d 606, 111 Ill. App. 3d 629 (1980); Southwick and Slee, Quality Assurance in Health Care, 5 J. Legal Med. 343, 386-96 (1984); D. Gregory, Immunity for Physicians in Peer-Review Committees, 11 Legal Aspects of Med. Practice No. 9, pp. 1, 2-4 (Sept. 1983); J. C. Norman, So-Called Physician "Whistle-Blowers" Protected: Immunity of Peer-Review Committee Members from Suit, 11 Legal Aspects of Med. Practice No. 2, pp. 4-7 (Feb. 1983).

F.2d 168 (5th Cir. 1984), held that PSROs were federal entities, thereby affirming the dismissal of an action under 42 U.S.C. § 1983. A similar result was reached in Taylor v. Flint Osteopathic Hospital, 561 Supp. 1152 (E.D. Mich. 1983), vacated and remanded for trial, 765 F.2d 146 (6th Cir. 1985), except that the plaintiff, a black physician alleging racial discrimination in a PSRO sanction decision, ultimately was found to be entitled to a trial on his 42 U.S.C. § 1981 claim. Thus, the result in Taylor is squarely in conflict with the result here. Cf. also, Doe v. St. Joseph's Hospital of Fort Wayne, 788 F.2d 411 (7th Cir. 1986), holding that a Korean physician who had been disqualified from hospital privileges could not bring an anti-trust action against a medical peer review committee because of the state action doctrine, but could maintain an

action under § 1981 for racial discrimination.

In short, the nature of PSROs, whether they are federal or private, has been interpreted virtually at will by the circuits, but in most cases in a manner which prevents the assertion of theories of recovery by persons who claim to be victims of the PSRO process. The variation in holdings as to the nature of PSROs, coupled with the near-uniformity in rulings against individual physicians seeking to challenge actions by PSROs, essentially leaves the medical community without the protection of any rational rule of law. The confusion in this area of law clearly requires resolution by this Court.

IV. THE DECISION BELOW RAISES IMPORTANT ISSUES RELATED TO THOSE PRESENTED BY A PENDING CASE, PATRICK V. BURGET.

Patrick v. Burget, 800 F.2d 1498 (9th Cir. 1986), pet. for cert. pending,

No. 86-1145, like the present case, concerns the scope of potential liability for medical peer reviewers who are alleged to have conducted peer review activities in bad faith. Patrick also raises the question of the limits to judicially-created doctrines of immunity where Congress has expressly indicated, by statute, its determination that public policy requires less than complete immunity for peer reviewers.

In Patrick the Ninth Circuit reversed a jury verdict finding the defendant physicians liable for conducting in-hospital peer review activities in a manner that violated federal anti-trust laws. The Ninth Circuit held that the peer review activities at issue in Patrick, which were authorized by an Oregon statute that required that medical facilities have procedures for reviewing staff privileges

and professional competence, were immune from antitrust liability by virtue of the state statute and state supervision of the process that the court found to exist.

The Ninth Circuit's decision in Patrick was the impetus behind passage of the Health Care Quality Improvement Act of 1986, Title IV, Public Law No. 99-660, which authorized peer review activities in private settings and provides for limited good faith immunity for participants,[25] and which also specifically provides that there is a cause of action remaining under 42 U.S.C. § 1981 against peer reviewers. The limited good faith immunity provided in the new law is substantially the same as that contained in the Medicare peer review law at issue here, 42

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[25]132 Cong. Rec. H9960 (daily ed. October 14, 1986) (statement of Rep. Edwards).

U.S.C. § 1320c-16,[26] and is also substantially the same as that provided in many state statutes.[27]

In the present case, the claims asserted were not antitrust, but rather were claims of racial discrimination, conspiracy, violation of constitutional rights, malicious prosecution and intentional infliction of severe emotional distress. If antitrust claims had been asserted, there could have been little basis for the assertion of state action immunity defense by the peer review defendants in view of the federal

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[26]Now 42 U.S.C. § 1320c-6.

[27]State ex rel. Chandra v. Sprinkle, 678 S.W.2d 804, 806 n. 13 (Mo. en banc 1984) (Missouri Supreme Court recognized in dicta that peer reviewers would have only good faith immunity under Missouri Statute); Franco v. District Court of Denver, 641 P.2d 922 (Colo. 1982) (granting review committee and members qualified immunity); Buckner v. Lower Florida Keys Hospital District, 403 So.2d 1025, 1028 (Fla. App. 1981) (granting only good faith immunity).

statute authorizing the establishment of the SEMO PSRO. However, the absolute immunity granted by the Eighth Circuit in the present case, if carried to its logical conclusion, would bar civil damages actions arising out of private peer review as well as Medicare peer review, on whatever theory.[28] There is a potential for direct conflict between the Eighth Circuit, which may extend Kwoun to all medical peer review activities, and Patrick, should this Court find that the Ninth Circuit's decision in Patrick should be reversed, because in the Eighth

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[28]The decision in Patrick left open the possibility that state law theories such as malicious prosecution could be asserted on remand. Patrick, at 1509. The Seventh Circuit in Doe v. St. Joseph's Hospital of Fort Wayne, 788 F.2d 411 (7th Cir. 1986), held that a physician excluded from hospital staff privileges under the hospital's peer review process could not assert an anti-trust claim because of state action immunity, but remanded for trial on the physician's Title VII and 42 U.S.C. § 1981 claims based on race, Korean.

Circuit, even if an anti-trust theory lies, all possible defendants would have absolute immunity from suit.

CONCLUSION

For the foregoing reasons, a writ of certiorari should be issued to review the judgment and opinion of the Eighth Circuit.

Respectfully submitted,

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